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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-536

JACK R. DUCKWORTH, JOE F. KOZLOWSKI,
PETE G. YOUNGBLOOD, BOB GLANCY,
R. SHRINER, RODNEY KEITH,
RONALD BATCHELOR, G. WILKINS,
BRAYON GLICK,
Petitioners,

VS.

BILLIE R. ADAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, Jack R. Duckworth, Joe F. Kozlowski, Pete G. Youngblood, Bob Glancy, R. Shriner, Rodney Keith, Ronald Batchelor, G. Wilkins, and Brayon Glick, respectfully pray this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), entered in cause number 78-1109 on July 3, 1979, which reversed the judgment of the United States District Court for the Northern District of Indiana, South Bend Division (hereafter District Court).

OPINIONS BELOW

The order of the Seventh Circuit issued on July 3, 1979, has not been officially reported. A copy of said order is

appended hereto at page A-1. The December 5, 1977, opinion of the District Court has not been officially reported. A copy of said opinion is appended hereto at page A-10. Some typographical errors have been corrected.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1)(b) of the Rules of this Court, to review a decision of the Seventh Circuit that is in conflict with applicable decisions of this Court.

The decision of the Seventh Circuit was entered on July 3, 1979. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit erred in considering the appeal herein when the notice of appeal was filed five (5) days late.

2. Whether the Seventh Circuit has erroneously expanded the role of Federal courts by reversing the District Court's dismissal of a complaint and thereby requiring that Court to evaluate the minutiae of daily prison routine.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 4, Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

STATEMENT OF THE CASE

This Petition arises from the reversal by the Seventh Circuit of a decision by the District Court in the case of *Adams v. Duckworth et. al.*, Cause No. S77-35 whereby the District Court dismissed a purported civil rights complaint filed by Respondent (Plaintiff below).

Facts Material to the Consideration of the Questions Presented

Respondent, a prisoner at the Indiana State Prison, filed the first complaint in this action on March 7, 1977, purporting to allege violations of his Eighth Amendment

rights. This complaint was supplemented on April 7 and July 28, adding the names of additional defendants and asserting violations of First and Fourteenth Amendment rights. Petitioners (Defendants below) moved to dismiss the original and first supplemental complaints on May 2, 1977, and the second supplemental complaint on September 7, 1977. The District Court issued its Memorandum Opinion and Judgment dismissing this action on December 5, 1977. See Appendix at page A-10. Respondent's notice of appeal was filed on January 9, 1978. The Seventh Circuit reversed the judgment of the District Court on July 3, 1979. See Appendix at page A-1.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Seventh Circuit Erred in Considering the Appeal herein when the Notice of Appeal was Filed Five (5) Days Late

Consideration of the appeal in this case was precluded in the Seventh Circuit by reason of Rule 4(a), Federal Rules of Appellate Procedure. In rendering its decision, the Seventh Circuit is thus in conflict with an applicable decision of this Court in *Browder v. Director, Illinois Department of Corrections,* 434 U.S. 257 (1978), in which the Court held:

> This 30-day time limit is "mandatory and jurisdictional." (Citations omitted.) The purpose of the rule is clear: it is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and, if it has not, to advise prospective appellees that they are free of appellant's demands. Any other construction of the statute would defeat its purpose." (Citation omitted.) *Id.,* at 264.

A notice of appeal is a simple instrument to prepare and file. *Files v. City of Rockford,* 440 F.2d 811 (7th Cir. 1971). The Rule applies to all parties wishing to appeal, and applies to state prisoners. *Dunn v. Henderson,* 446 F.2d 1398 (5th Cir. 1971). While this Court has overlooked untimely filing by a prisoner if he has made every effort to comply, *Fallen v. United States,* 378 U.S. 139 (1964), it cannot be said in the present case that Respondent made such effort. The record contains no showing of, or attempt to show, excuseable neglect. *See, Brainerd v. Beal,* 498 F.2d 901 (7th Cir. 1974), *cert. denied,* 419 U.S. 1069, *reh. denied,* 420 U.S. 913. The judgment of the District Court was entered on December 5, 1977. Respondent signed his notice on the thirtieth day, January 4, 1978. As a prisoner, he knew that the notice would have to be mailed to the District Court and could not arrive on January 4. No time is allowed for mailing. *Lashley v. Ford Motor Co.,* 518 F.2d 749 (4th Cir. 1975). It is the date of filing rather than the date on which the notice is signed that controls. *Durel v. United States,* 299 F.2d 583 (5th Cir. 1962).

While Petitioners did not raise the untimely filing in the Seventh Circuit, it is a question that the Courts of Appeal may consider *sua sponte. Richland Knox Mutual Ins. Co. v. Kallen,* 376 F.2d 360 (6th Cir. 1967). The Seventh Circuit made no mention of the late filing. It is an issue that the Courts of Appeal cannot waive or modify, *Reed v. People of the State of Michigan,* 398 F.2d 800 (6th Cir. 1968), and therefore one that the Courts must consider whether argued or not. *Fine v. Paramount Pictures, Inc.,* 171 F.2d 571, 574 (7th Cir. 1948). As timely filing is jurisdictional, *Browder v. Director, supra,* it is an issue that can be raised at any stage of the proceedings. *See, Glidden Company v. Zdanok,* 370 U.S. 530, 535-36 (1962).

The Seventh Circuit should have dismissed the appeal for lack of jurisdiction, and in considering the appeal and reversing the judgment of the District Court, the Seventh Circuit is clearly in conflict with this Court's very recent decision in *Browder.*

II.

The Seventh Circuit has Erroneously Expanded the Role of Federal Courts by Reversing the District Court's Dismissal of a Complaint and Thereby Requiring that Court to Evaluate the Minutiae of Daily Prison Routine

The complaint and supplements comprise approximately fifty handwritten pages listing many grievances. The Conduct Adjustment Board (the institutional "court") found Respondent guilty of possessing marijuana and money and sentenced him to a term in segregation. He was to serve the term in the I-Cellhouse Detention Unit ("I.D.U."). He seeks to raise several claims, none of which is of constitutional magnitude. He complains that he was stripped and searched while other offenders were not stripped; that he has been locked up for investigation and released without being charged; that he was denied a visit with a particular person; that he was not allowed to attend religious services while in segregation; that he was denied the use of the law library on weekends; that the administrative appeals might be determined after the sentence had been served; that the medication he received was inadequate; that he suffered the effects of "mace" sprayed at adjoining cells; that property was lost when he was moved to the segregation unit; that the visiting room was too small; that he did not have adequate access to the telephones; that mail was delayed or lost; that he was not able to get a new lightbulb until the morning; that he could not get matches on demand; that he could not get a change of linen if Monday is a holiday; that on certain occasions he did not get certain foods; that coffee is not served with the evening meal; that one day in June, 1977, the heat was left on; that mentally ill prisoners were housed in nearby cells; that the Conduct Adjustment Board "falsely" continued his case thereby raising the inference that it was not the actual decision maker and therefore was not impartial; that the Board only recorded

those facts that supported its decision; that certain officers lied in their reports; that the periodic review of the status of those in segregation was undertaken by the Board; and, that conditions in I.D.U. are unsanitary. Respondent sought injunctive relief in his original complaint and monetary damages in his supplemental complaints.

The complaint and supplements are actually a compendium of petty grievances and disagreements. No single claim states a violation of a constitutional right. The Seventh Circuit erred in reversing the judgment of the District Court — an error that would turn the District Court into a forum for a grievance session for any inmate who dislikes the manner in which the State administers the institution and who lists enough grievances. This is clearly in conflict with decisions of this Court.

This Court has recognized certain rights that are retained even in prison. However, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 U.S. 266, 285 (1948). Given that fact, and given the fact that Respondent is merely presenting a series of minor inconveniences that in no way could or do amount to a violation of the Constitution, the District Court should not be required to listen to such petty grievances, but should be allowed to determine, as it did, that the matters sought to be raised are matters on which it must defer to the decisions of corrections officials. *See, Pell v. Procunier,* 417 U.S. 817 (1974).

> Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators. We noted in *Procunier v. Martinez,* 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974) that
>
> "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact

> reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." See also, *Cruz v. Beto,* 405 U.S. 319, 321, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1971).
>
> *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119, 126 (1977).

There are many competing philosophies and theories of corrections, and the courts are

> not to exercise judicial power for the attainment of what [judges] as individuals might like to see accomplished in the way of ideal prison conditions. There are those who would argue that imprisonment in any form is cruel and unusual. *Newman v. Alabama,* 559 F.2d 283 (5th Cir. 1977), *cert. denied,* ___ U.S. ___, 98 S.Ct. 3144 (1978).

This was most recently pointed out by this Court in *Bell v. Wolfish,* ___ U.S. ___, 99 S.Ct. 1861 (1979), in which this Court deferred to the federal authorities responsible for running the Metropolitan Correction Center in New York. That the Petitioners are officials and officers of a *state* institution is an additional reason for judicial restraint. *Jones, supra,* at 126.

The District Court clearly followed the decisions of this Court that were ignored by the Seventh Circuit 42 U.S.C. § 1983 was never intended to serve as a basis for allowing Federal courts to intervene in purely administrative matters. The Eighth Amendment proscribes conduct that constitutes "unnecessary and wanton infliction of pain." *Gregg v. Georgia,* 428 U.S. 153, 173 (1976); *see also, Estelle v. Gamble,* 429 U.S. 97 (1976).

No condition alleged in any of the complaints or supplements is of constitutional magnitude. The conditions, practices and acts alleged may seem uncomfortable and displeasing to some, but it must be kept in mind that Respondent is a prisoner and is living in prison. There is

no right to maximum comfort or to have a particular theory of penology put into effect. The "cumulative impact" approach taken by the Seventh Circuit (See Appendix at p. A-) is not supported by decisions of this Court. In *Bell v. Wolfish, supra,* this Court considered each condition and practice separately, not as adding to the total environment.

Because of the needs of security and order, inmates may be strip searched. *Bell v. Wolfish, supra.* Inmates are sometimes subject to being housed in different areas when an investigation is necessary. *Four Certain Unnamed Inmates v. Hall,* 550 F.2d 129 (1st Cir. 1977), citing *Montanye v. Haymes,* 427 U.S. 236 (1976). Likewise, movements within the institution are necessarily and legitimately restricted when one is placed in segregation; thus, the ability to attend religious services is lost during that time. Visits and facilities for visiting, telephone access, access to the law library on weekends, light bulbs, matches, mirrors, linen on holidays, coffee at night, specific items on the menu, the type of medication received, and the placement of prisoners are all conditions of confinement best left to the discretion of the trained authorities on the scene. Otherwise, courts would be forced to assert themselves into the most minute, insignificant details of daily prison life, whenever an inmate disagrees with an administrative decision.

The due process claims are likewise merely minor grievances. There is no absolute right to call witnesses, *Baxter v. Palmigiano,* 425 U.S. 308, 321 (1976), and deference is proper. The Board is to report its findings, not everything that it hears. In their findings of fact, courts state what they find, not what everybody testifies. That disciplinary appeals may not be decided until the sentence is served is no more a violation than that overburdened appellate courts might not decide a criminal appeal until the defendant has completed his sentence.

The conditions of I.D.U. alleged to be unconstitutional were considered previously by the same district court in a

class action suit, although with a different judge then presiding. *Aikens v. Lash,* 371 F.Supp. 482 (N.D. Ind. 1974). The district court held against the plaintiff inmates on their claims. *Id.,* at 495. The district court disapproved of certain of the conditions that it found, but appropriately determined not to interfere in areas reserved to state prison officials. *Aikens* was a class action that included future inmates such as Respondent, and the issues should be laid to rest.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
(ARGUED NOVEMBER 27, 1978)
JULY 3, 1979

Before
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

BILLIE R. ADAMS,
Plaintiff-Appellant,

No. 78-1109 vs.

JACK R. DUCKWORTH, JOE F. KOZLOWSKI, PETE G. YOUNGBLOOD, BOB GLANCY, R. SHRINER, RODNEY KEITH, RONALD BATCHELOR, G. WILKINS, BRAYON GLICK,
Defendants-Appellees.

Appeal from the
United States District
Court for the Northern
District of Indiana,
South Bend Division.

No. S-77-35 (Civil)
ALLEN SHARP, *Judge.*

ORDER

Plaintiff-appellant Billie R. Adams appeals from the order of the district court granting defendants-appellees' motion to dismiss his *pro se* amended complaint for failure to state a claim upon which relief could be granted, pursu-

ant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Appellant contends the failure of the district court to construe liberally his *pro se* amended complaint, as well as the substantial nature of the allegations raised therein and the incorrect rulings on these allegations, require that the decision of the district court be reversed and remanded. In consideration of the arguments advanced in support of these contentions, we regard the district court's order of dismissal to be improvidently rendered. Accordingly, for the reasons set forth below, we vacate the order of the district court, and remand the cause with instructions to permit the appellant the opportunity to prove the allegations presented by his complaint.

I.

The appellant is and, at all times relevant to this action, has been a prisoner at the Indiana State Prison in Michigan City, Indiana. On March 7, 1977, he filed a *pro se* civil rights action under 42 U.S.C. § 1983 against the warden and six other named employees of the Indiana State Prison. On April 7, 1977, and again on July 28, 1977, the appellant filed supplemental complaints naming two additional prison employees as defendants. These supplemental complaints were treated by the district court as amendments to the original complaint for purposes of the motion to dismiss.

Appellant's complaint challenged the procedure by which he was placed in disciplinary segregation at the prison, and also the conditions of his confinement in the disciplinary segregation unit. Appellant challenged the procedures which accompanied the decision to place him in disciplinary segregation on due process grounds, alleging, *inter alia,* that he did not receive an impartial hearing, that his ability to call witnesses was restricted, that he did not have an opportunity to testify, that the decision was not based upon substantial evidence, and that the evidence relied upon and the reasons for the decision were not stated by the Conduct Adjustment Board in its decision.

With respect to the constitutionality of the conditions of his confinement, the appellant asserted the conditions in the maximum security unit at the prison constituted cruel and unusual punishment under the Eighth Amendment, alleging, *inter alia,* that the detention unit was unsanitary, that the plumbing was inadequately maintained, and that his cell lacked heat and proper ventilation. He also complained of the presence of insects and rodents in his unit, the excessive use of mace, inadequate clothing, the lack of medical and psychiatric care, and of being required to live in close proximity with mentally disturbed prisoners, whom he had seen stab other inmates. Appellant also alleged certain violations of his First Amendment rights, including the denial of his access to religious services and materials.

Appellant sought injunctive and declaratory relief, as well as monetary damages in the amount of $90,000. The district court, in its memorandum opinion and order, dismissed certain of the named defendants on the ground that the appellant's complaint failed to allege sufficient personal involvement under 42 U.S.C. § 1983 with respect to these defendants. The district court then granted the appellees' motion to dismiss for failure to state a claim as to the other defendants, and the appellant subsequently appealed to this Court.

II.

As a threshold matter, we hold that the dismissal of defendants Duckworth, Kozlowski, Youngblood, Glancy, Glick and Wilkins constituted reversible error. Where equitable relief, as distinguished from the monetary damages, is sought under the provisions of the Civil Rights Act, the personal involvement of the defendant is not required. See *Adams v. Pate,* 445 F.2d 105, 107, n.2 (7th Cir. 1971). Thus, assuming *arguendo* that the appellant did not allege sufficient personal involvement on behalf of these six defendants to state a claim for relief as to monetary damages, the appellant's claim for equitable relief against these defendants is cognizable under 42

U.S.C. § 1983. In reversing the order of the district court on this ground, however, we express no view concerning the sufficiency of the plaintiff's allegations of personal involvement as to these six defendants. On remand, therefore, the court is directed to reinstate the appellant's complaint against these six defendants for purposes of re-evaluating appellant's claims for monetary and equitable relief.

III.

Addressing the appellant's contention that his *pro se* amended complaint alleged sufficient facts to state a claim for relief, we conclude the district court erred in dismissing his complaint under Fed. R. Civ. P. 12 (b)(6).

It is well-settled that a complaint should not be dismissed for failure to state a claim unless it appears "beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Moreover, motions to dismiss are subject to even greater scrutiny in cases of *pro se* complaints. *Haines v. Kerner,* 404 U.S. 519 (1972). Due to the lack of legal expertise that accompanies their preparation, *pro se* complaints are generally entitled to a liberal construction. *French v. Heyne,* 547 F.2d 994 (7th Cir. 1976). Additional reasons exist for requiring that *pro se* complaints drafted by prisoners be accorded special liberality, which reasons are present in the case at bar. Appellant was confined in an isolation unit at the prison at the time he filed his original complaint and two supplemental complaints, and the fact of his confinement was made known to the district court. The original complaint alleged: "Plaintiff being confined in disciplinary segregation is unable to gather any further information or to have access to proper forms, typewriter, and experience needed to abide by every rule of the court." The predicament confronting the appellant in this case is similar to that encountered by the prisoners-plaintiffs in *LaBatt v. Twomey,* 513 F.2d 641 (7th Cir. 1975), in which we held that the district courts should be especially cautious in granting summary disposition under such circumstances. *LaBatt v. Twomey, supra,* at 650.

In this case, the record demonstrates that the district court failed to construe liberally the appellant's *pro se* complaint. No recognition is made in the court's opinion that the appellant was proceeding *pro se,* but rather, the court stated "while plaintiff's complaint is vague, desultory, inconcise and difficult to follow as a result of not being constructed in numbered paragraphs as contemplated by Federal Rules of Civil Procedure, it is clear that nowhere does it state a claim upon which relief can be granted."

IV.

Construing the appellant's *pro se* amended complaint liberally, it cannot be said that he is entitled to no relief under any set of facts which could be proved in support of his claims. A fair reading of the allegations contained in the complaint indicates appellant was confined to disciplinary segregation prior to being afforded a hearing, that the subsequent hearing was not impartial, that the Conduct Adjustment Board recorded only certain facts, that appropriate procedures were not followed, that all witnesses appellant wanted were not called, and that the decision was not based upon substantial evidence. These allegations (when taken as true as they must be on a motion to dismiss) indicate that appellant was confined to disciplinary segregation without being accorded due process of law in violation of the rights secured to him by the Fourteenth Amendment.

In the context of this case, the reliance of the district court on *Adams v. Pate,* 445 F.2d 105 (7th Cir. 1971) to dismiss the appellant's procedural due process claims is inapposite. In *United States ex rel. Miller v. Twomey,* 479 F.2d 701 (7th Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974), and its progeny, this Court further delineated the procedural due process standards governing the placement of prisoners in disciplinary segregation.

Thus, absent emergency circumstances, a prisoner is entitled to notice and a hearing before he is confined to segregation. *LaBatt v. Twomey,* 513 F.2d 641 (7th Cir. 1975); *Hayes v. Walker,* 555 F.2d 625 (7th Cir. 1977). Since no emergency is claimed to have existed in this case, the decision to place the appellant in segregation without a hearing is judicially reviewable, and the allegations concerning his pre-hearing segregation should not have been dismissed.

Furthermore, a prisoner subject to disciplinary confinement is entitled to an impartial hearing, an opportunity to call witnesses unless to do so would jeopardize institutional security, and a decision based upon substantial evidence which sets forth the reason for the decision and the evidence relied upon. *Aikens v. Lash,* 547 F.2d 372 (7th Cir. 1976); *Hayes v. Walker, supra.* In this case, appellant alleged that the fact finders who imposed disciplinary segregation upon him were not impartial. It is fundamental to do process that fact finders be impartial. *United States ex rel. Miller v. Twomey, supra.*

Appellant also alleged he was not permitted to call all of his witnesses to the disciplinary hearing. Although the right to call witnesses at such hearings is limited, *Baxter v. Palmigiano,* 425 U.S. 308, 321 (1976), and prison officials retain broad discretion in determining whether to permit witnesses to be called, such discretion is not unfettered. *Wolff v. McDonnell,* 418 U.S. 539, 566 (1974). In this case, the record is silent as to the reasons why appellant was not permitted to call his witnesses. This Court has previously held that support for the denial of a request to call witnesses must appear on the record. *Hayes v. Walker,* 555 F.2d at 630. Appellant further alleged that the disciplinary hearing decision was not based upon substantial evidence and that the records of the hearing reflected only certain of the facts adduced. These allegations, when taken as true, indicate procedural due process violations. Discipline decisions must be based upon substantial evidence, *Aikens v. Lash, supra,* and must be supported by a written statement of the fact finders as to the evidence

relied upon and the reasons for the disciplinary action. *Hayes v. Walker, supra; Wolff v. McDonnell, supra.*

Accordingly, in view of the appellant's *pro se* status and the substantial nature of his procedural due process allegations, we conclude his complaint stated valid claims upon which relief could be granted.

V.

Similarly, we conclude the district court erred in dismissing the appellant's complaint challenging the conditions of his confinement for failure to state a claim under the Eighth Amendment. In its opinion, the district court relied extensively upon *Aikens v. Lash,* 371 F. Supp. 482 (N.D. Ind. 1974), to hold that the appellant failed to state a claim on issues pertaining to the living conditions in the "I" Cellhouse Detention Unit (IDU) at the Indiana State Prison. However, *Aikens* did not sanction the conditions in the IDU as constitutionally adequate, but rather deferred consideration of the claims challenging these conditions until the legislature and the prison staff had an opportunity to act in correcting the many deficiencies existing on the IDU. *Aikens, supra* at 495. Nor did this Court place an imprimatur of constitutionality upon the conditions in the IDU on the appeal in that case. *Aikens v. Lash,* 514 F.2d 55, 58, n.8 (7th Cir. 1975). Accordingly, we do not regard these decisions as *res judicata* of the appellant's challenge to the conditions of his confinement.

Moreover, we regard the substantial nature of the appellant's allegations concerning these conditions as sufficient to state a claim for relief. These conditions, which have been summarized previously, are typical of the conditions which have been condemned by other courts as violative of the Eighth Amendment. Thus, in measuring these conditions under the strictures of the Eighth Amendment, the court must judge whether the conditions complained of would be shocking to the collective national conscience. See, *e.g., LaBatt v. Twomey,* 513 F.2d 641 (7th Cir. 1975). In evaluating conditions of confinement against this stan-

dard, the court may consider the cumulative impact of all the challenged conditions, *Kirby v. Blackledge,* 530 F.2d 583, 587 (4th Cir. 1976), the duration of the punishment, *LaBatt v. Twomey, supra* at 648, and the appropriateness of the punishment vis-a-vis the severity of the offense. *LaReau v. MacDougall,* 473 F.2d 974 (2d Cir. 1972).

Application of these principles to the instant case compels the conclusion that the appellant's *pro se* complaint alleged sufficient facts to state a claim for relief under the Eighth Amendment. The appellant was confined to the maximum security unit for a period of six months as a result of the possession of marijuana and money. Considering the duration and proportionality of his punishment in light of the offenses, together with the cumulative impact upon the appellant of the debilitating conditions alleged in his complaint, we find the appellant is entitled to an opportunity to prove the allegations challenging the conditions of his confinement.

VI.

Finally, we conclude the appellant has stated a constitutional claim based upon a denial of his First Amendment religious rights. In view of the appellant's *pro se* status, we regard his factual allegations as sufficient to raise an issue whether his confinement unconstitutionally denied him access to religious materials and individual religious services. On remand, therefore, the appellant will be permitted to prove a constitutional violation of his rights secured by the First Amendment.

As a final note, we observe that, in ruling on the sufficiency of the appellant's claims, the district court was confronted with the difficult and laborious task of analyzing some fifty handwritten pages representing the appellant's *pro se* original and two supplemental complaints. In remanding this case to the district court, we are sympathetic to the burden imposed upon the court by the nature of the appellant's complaint. However, we take solace that this burden will be alleviated in the assurance

at oral argument by appellant's counsel on appeal, Legal Services Organization of Indiana, Inc., that it will represent the appellant in the event the case is remanded.

For the foregoing reasons, the order of the district court dismissing the appellant's complaint is vacated, and the cause is remanded with directions to permit the appellant an opportunity to prove the allegations raised in his complaint.

VACATED and REMANDED

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

BILLIE R. ADAMS

Plaintiff

v.

JACK DUCKWORTH
J. F. KOZLOWSKI
P. G. YOUNGBLOOD
BOB GLANEY
R. SHRINER
RODNEY KEITH
RONALD BATCHELOR

Defendants

No. S 77-35

MEMORANDUM OPINION

Defendants Duckworth, Kozlowski, Youngblood, Glancy, Glick and Wilkins are dismissed from this cause since in his supplemental complaint plaintiff requests monetary damages from all defendants. The Seventh Circuit has ruled that where monetary damages rather than equitable relief is sought under the provisions of the Civil Rights Act the doctrine of respondent superior does not apply, and personal involvement of a defendant is required. *Adams v. Pate,* 445 F.2d 105 (7th Cir. 1971). These individuals are named as defendants but their names do not appear in the body of the complaint and apparently plaintiff's complaint does not allege any overt acts on their part which denied plaintiff his rights under 42 U.S.C.A. § 1983.

Plaintiff's first allegation is that he was subjected to an

unreasonable search. It has long been established that a convict loses a great measure of his protection against unreasonable searches and seizures. *Martin v. United States,* 183 F.2d 436 (4th Cir. 1950), and that a prisoners' right to be free from unreasonable searches is subject to curtailment made necessary by the purposes of confinement and the requirements of security. *Palmigiano v. Travisono* (D.C. R.I.) 317 F. Supp. 776.

Circumstances very similar to this case were faced by the U.S. District Court of the Western District of Missouri in *Burns v. Wilkinson* (W.D. Mo.) 333 F. Supp. 94 (1971). There, the inmate alleged that he had been "compelled by guards at the prison to strip naked in an aggressive and belligerent manner, that he was taken from the immediate vicinity of his cell and was peremptorily constrained to remain undressed in the cold night air while said cell was ransacked and searched." *Burns v. Wilkinson, supra,* at 95. The Court concluded that:

> ... The facts alleged by petitioner, of a single search "at some time before midnight" carried out in an "aggressive and belligerent" manner, but during which no actual assault or other abuse is stated to have taken place, do not demonstrate that the search was unnecessary and unrelated to prison security. No violation of any federal right is thereby made out to warrant interference by a federal court in the control, discipline, treatment and security of state prisoners by the state of Missouri. In *United States v. Follette* (S.D.N.Y.) 282 F. Supp. 10, 13, it was held that, with respect to convicted probationers, a search could be deemed unreasonable "only if made too often or if made at an unreasonable hour or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the parole officer." None of these conditions are alleged by petitioner, nor are they inferable from the complaint or petition filed in this case. A ruling in favor of petitioner on the facts which he has alleged would set a precedent

> which would endanger the security of the prisons and the personal safety of the persons who maintain and guard the prisons. Petitioner therefore does not state any claim of denial of a federal right with respect to the search of his person. Nor does he allege any facts which, if true, would constitute irreparable injury. *Burns v. Wilkinson, supra,* at p. 96-97.

Hence plaintiff's allegation of unreasonable search and seizure do not raise questions of Constitutional dimension and does not state a claim upon which relief may be granted.

Plaintiff's second allegation is that he has been subject to cruel and unusual punishment because of harassment, being in disciplinary segregation and being denied visitation by a friend. None of these allegations have presented the Court with any question of constitutional dimension. As a general rule, the Eighth Amendment only gives constitutional dimension to punishment that is barbarous or shocking to the conscience of society. *LaReau v. MacDougall,* 473 F.2d 974 (2nd Cir. 1972), cert. denied 414 U.S. 878 (1973); *Watkins v. Johnson,* 375 F. Supp. 1005 (E.D. Pa. 1974), aff'd. 511 F.2d 1397.

The Seventh Circuit has held that to establish a violation of the Eighth Amendment, prisoners must show either that the actions of the prison intentionally inflicted excessive or grossly severe punishment on them or that conditions were so harsh as to shock the general conscience and were knowingly maintained by defendants. *LaBatte v. Twomey* 513 F.2d 641 (7th Cir. 1975).

Segregation by itself is not cruel and unusual punishment. *Miller v. Twomey* 479 F.2d 701 (7th Cir. 1973); *Krist v. Smith,* (D.C. Ga. 1970), 309 F. Supp. 497, 439 F.2d 146; *Newsome v. Sielaff* (D.C. Pa. 1974), 375 F. Supp. 1189. Plaintiff's general allegation of harassment lacks supporting evidence and is too broad to support a claim. The decision of whether or not to permit an inmate to receive visits from particular individuals has been held to be

within the discretion of prison officials. *Walker v. Pate* 356 F.2d 502 (7th Cir. 1966), cert. denied 86 S.Ct. 1598, 384 U.S. 966, 16 L.Ed.2d 678. Even if plaintiff's allegations were true they fail to state a violation of plaintiff's Eighth Amendment rights under 42 U.S.C. § 1983.

Plaintiff's third allegation is that he has been denied due process and equal protection. "Prison disciplinary proceedings are not part of a criminal prosecution and the full panoply of rights due a defendant is such proceedings does not apply . . . In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Wolff v. McDonnell* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed. 935 (1974). Due process requirements are met if there is some assurance of elemental fairness. *Nolan v. Scofati* 430 F.2d 548 (1st Cir. 1970). The Seventh Circuit has held that the requirements of due process in disciplinary hearings are met if the prisoner is confronted with the accusation and given a reasonable opportunity to present his side of the dispute:

> It thus appears that the prisoner is confronted with the accusation against him and afforded a reasonable opportunity to deny the accusation or explain his actions. In the context of the nature of the administrative action here involved, this would appear to fairly and rationally satisfy the concept of procedural due process. *Adams v. Pate,* 445 F.2d 105 (7th Cir. 1971).

Here plaintiff did not allege that he was not notified of the charges against him, nor does he allege that he was not allowed to deny the charge or explain his actions. Plaintiff does not even allege denial of access to the legal department, merely that it was not available on weekends; he does not allege that he was not allowed to call any witnesses on his own behalf or cross-examine the accusing officer; nor does he complain of a lack of appeal process, merely the time that might be involved. Plaintiff's challenges to the hearing are really questioning interpretation

of evidence and facts and the sentence imposed, not the procedure and his allegation about lack of impartial fact finders is unsupported. Failure to follow procedure at a disciplinary hearing is not a violation of constitutional rights. *Wolff v. McDonnell, supra.*

Also since the portion of plaintiff's complaint dealing with the disciplinary hearing is, in fact, challenging the fact of his confinement in seclusion, not the conditions of his confinement there, his claim is not cognizable under § 1983. The Supreme Court has ruled that 42 U.S.C. § 1983 is not the proper vehicle for relief for attempts to effect discharge from unlawful confinement. *Preiser v. Rodriguez,* 411 U.S. 488, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). Thus even if plaintiff's allegations were true, they fail to state a violation of constitutional rights cognizable under 42 U.S.C. § 1983.

Plaintiff apparently also feels that defendants are denying access to the courts by restricting access to notaries. However, plaintiff does not allege that he has been denied access to a notary or the courts and, from the fact that he filed two pleadings in one month, it appears that he was able to procure the services of a notary. Even if these allegations were true, and defendants do not concede that they are, they fail to state a claim upon which relief can be granted.

In the interest of fairness and justice the court chooses to accept the second pleading as a supplemental complaint and to treat it as an amendment to the original complaint.

Plaintiff's first request for relief asks that he be allowed the right to attend religious services on Sundays. It is well established that "Denial of permission to prisoners in administrative segregation to attend religious services (is) reasonable in the light of the need for security so long as inmates are allowed to receive religious materials and visits by the chaplain or other ministers of their choosing." *Diamond v. Thompson,* (D.C. Ala. 1973) 364 F. Supp. 659; *Sharp v. Sigler* (D.C. Neb. 1967) 277 F. Supp. 963. Plaintiff does not allege that he was denied access to the

chaplain or to religious material in segregation, and the claim he does advance is not of constitutional proportions.

All or parts of plaintiff's second, third, fourth, sixth, ninth, eleventh and twelfth requests for relief deal with the physical condition of the cells in the I.D.U. ("I" Cellhouse Detention Unit). The living conditions in the I.D.U. were also litigated in *Aikens v. Lash* (N.D. Ind. 1974), 371 F. Supp. 482,

> Plaintiffs contend that long-term confinement therein, under the living conditions and manner of operation, constitutes a deprivation of rights under the Fourteenth, Eighth, Fourth, and First Amendment to the United States Constitution. *Aikens v. Lash, supra,* at 492.

Since that trial was held at the prison, Judge Grant, the presiding judge, was able to inspect the I.D.U. personally:

> Mention should also be made of the fact that our presence there made possible an unannounced inspection trip through the two segregation units involved in this controversy. With the prior knowledge and approval of all counsel and flanked only by a law clerk and one prison guide, it was possible for the Judge to walk the "range" on both floors of both units, located in separate buildings a short walk from the courtroom. *Aikens v. Lash, supra,* at 485.

As a result of his inspection and the other evidence presented in *Aikens,* Judge Grant ruled that one of the seclusion units, the Deputies Office Unit (D.O.) was unconstitutional and violated the Eighth Amendment. However, the Court held "against the plaintiffs on their constitutional challenges against the I.D.U. Seclusion Unit." *Aikens v. Lash, supra,* at p. 495. Conditions there were held not to constitute a deprivation of the constitutional rights of inmates.

Other courts, including the Seventh Circuit have dealt with similar circumstances involving ventilation, com-

modes, cleanliness, showers, lack of radios and other cell conditions. In those cases, allegations of disorder, discomfort, inconvenience, and maintenance problems were held not sufficient to suggest deprivation of any right secured by the constitution or laws or show conditions so foul, inhumane and violative of the basic concepts of decency as to fall within the proscription of the Eighth Amendment. *Adams v. Pate, supra,* at 109; *Bussue v. Lankler* (D.C. N.Y. 1972), 337 F. Supp. 146; *Lovern v. Cox* (D.C. Va. 1974), 374 F. Supp. 32. Thus, even if plaintiff's allegations were true, they fail to state a claim of action upon which relief can be granted.

All or parts of plaintiff's fourth and fifth requests for relief deal with the food and food service at the I.D.U. Plaintiff alleges that the food is not hot enough, the meals do not vary enough from week to week and that the eating utensils are inadequate.

The court also reviewed the dietary and utensil policies of the I.D.U. in *Aikens* and found that the dietary and service policies of the I.D.U. were adequate and did not raise any questions of constitutional magnitude.

> The segregation units are provided the same food as the rest of the general prison population. The menu for each week is based upon a recommendation of the Director of Food Service for the State, who is a licensed dietitian. Food to these units is delivered by an electronically-controlled hot food cart. Tests have shown that there is a loss of but 4° or 5° in transporting these carts from the kitchens to the seclusion units. *Aikens v. Lash, supra,* at 493.

The Court also held that denial of items that could be turned into weapons was reasonable in the I.D.U. for security purposes.

While use of plastic rather than metal utensils was not decided by *Aikens,* it is clear that these items are more easily converted into weapons than stainless steel trays and therefore, under *Aikens,* it should be within the discretion of prison officials to deny the use of metal utensils for security reasons.

Plaintiff's seventh request for relief deals with medical treatment. Plaintiff does not allege that he is currently in need of medical care, nor does he allege that he has been deprived of medical care, though he does contend that the cold pack provided for him was inadequate. Therefore, this complaint does not allege a violation of constitutional rights since the Seventh Circuit has consistently held that improper, insufficient or inadequate medical treatment of prisoners does not state a constitutional claim. *U.S. ex rel. Lawrence v. Ragen,* 323 F.2d 410 (7th Cir. 1963); *Henderson v. Pate,* 409 F.2d 507 (7th Cir. 1969). The prisoner must actually be deprived of essential medical care before a cause of action is alleged. *U.S. ex rel. Knight v. Ragen,* 337 F.2d 425 (7th Cir. 1964), cert. denied, 380 U.S. 985 (1964). Plaintiff alleges only inadequate medical care, not deprivation of medical care, therefore, he has not stated a valid claim for which relief can be granted.

The issue of medical care in the I.D.U. was also litigated in *Aikens.* The Court ruled that the medical services were not inadequate and did not constitute deprivation of constitutional rights.

> True, these services are not as adequate nor nearly as speedy as the plaintiffs demand but countless citizens outside the Prison walls will testify that doctors are busy people and are not always ready to break and run the moment we demand them, day or night. *Aikens v. Lash, supra,* at p. 493.

Plaintiff's eighth request for relief asks that "plaintiff be given daily outdoor fresh air exercise time with recreation facilities, materials and with access to library for reading materials." In *Aikens* Judge Grant specifically noted that:

> Prisoners are confined in I.D.U. twenty-four hours a day and are not allowed outside their cells for exercise and are only temporarily released for visits or hospitalization, but for few other reasons. *Aikens v. Lash, supra,* at 493.

The Court in *Aikens* did not rule these restrictions unconstitutional and noted that a shortage of manpower precluded the prison from providing some of the services sought by plaintiffs. Plaintiff does not allege denial of reading material in seclusion. Plaintiff's allegations do not raise any question of constitutional proportions.

Plaintiff's tenth request for relief seeks that he be free from "restraint(s) on visits" and "from all Chemical Agents as corporal punishments."

It is well established that visitation privileges are within the discretion of prison officials and absent extraordinary circumstances federal courts should not interfere with their discretion. *Walker v. Pate,* (7th Cir. 1966) 356 F.2d 502, cert. denied 86 S.Ct. 1598, 384 U.S. 966, 16 L.Ed.2d 678; *McCray v. Sullivan,* (5th Cir. 1975), 509 F.2d 1332, 339 F. Supp. 271. Plaintiff's allegations dealing with restrictions on visitation do not present such extraordinary circumstances as to invoke intervention by the courts.

As to plaintiff's allegations regarding corporal punishment, the criteria used in determining if an assault against a prisoner reaches the magnitude of a constitutional deprivation is "whether the complaint indicates that the prisoner has received physical and mental abuse or corporal punishment of such base, inhumane and barbaric proportions that it shocks and offends the Court's sensibilities and offends the Eighth Amendment as well." *Butler v. Bensinger* (D.C. Ill. 1974), 377 F. Supp. 870. In this case it does not appear that plaintiff has been the subject of any corporal punishment, either physical or chemical, let alone that he was subject to base or inhumane treatment.

Courts have upheld the use of mace in proper circumstances as being within the discretion of prison officials. *Crafton v. Rose,* (D.C. Tenn. 1972), 369 F. Supp. 131; *Washington v. Anderson* (E.D. Okla.), 387 F. Supp. 412 (1974). Plaintiff does not allege that mace was used in improper circumstances.

Plaintiff also alleges on pages 7 and 8 of his complaint that the personal property he was prohibited from taking into seclusion has been lost through the negligence of defendants. Even if this were true, it is not conduct which states a claim under the civil rights statutes since it does not deprive him of rights, privileges or immunities secured him by the Constitution or laws of the United States. *Howell v. Cataldi,* 464 F.2d 272 (3rd Cir. 1972).

> Plaintiff's final claim is for restitution for personal belongings which were missing after his property was sent to him in the maximum security cell block.... Even assuming that plaintiff could establish that defendants are liable for the loss of his personal articles, it would seem that such liability would be founded on either a theory of common law negligence or breach of a state statutory duty—neither of which are cognizable actions under the Civil Rights Act. Id. Plaintiff's claim for restitution should, therefore, be dismissed. *Collins v. Haga,* 373 F. Supp. 923 (1974).

While plaintiff's complaint is vague, desultory, inconcise and difficult to follow as a result of not being constructed in numbered paragraphs as contemplated by the Federal Rules of Civil Procedure, it is clear that nowhere does it state a claim upon which relief can be granted. Even if plaintiff's allegations were true they fail to state a violation of constitutional rights cognizable under 42 U.S.C. § 1983.

Plaintiff's Second Supplemental Complaint to this cause of action alleges violations of his First, Eighth and Fourteenth Amendment rights. The facts of his Complaint fail to state a claim upon which relief can be granted.

Allegation 1(A) deals with the conditions and operations of the visiting room. All that is required of a visitation area is tolerable comfort or minimally tolerable physical conditions. *Giampetruzzi v. Malcolm,* 406 F. Supp. 836 (D.C. N.Y., 1975). Restricting to three the number of prisoners using the facilities at one time is within the

discretion of officials. In *Giampetruzzi* it was found that allowing only two prisoners at a time in receiving units was reasonable to thwart escape attempts. Plaintiff's allegations of retaliation are conclusory and do not state a cause of action.

Allegation 1(B) deals with alleged denial of access to a telephone. Plaintiff does not allege personal involvement of any of the named defendants. To be actionable there must be personal involvement in such acts. *Adams v. Pate,* 445 F.2d 105 (7th Cir. 1971); *Boyd v. Adams,* 364 F. Supp. 1180 (N.D. Ill. 1973).

Allegation 1(C) deals with delay in mail delivery. Prisoners cannot permissibly be denied mail. *Collins v. Schoonfield,* 344 F. Supp. 257 (D.C. Md., 1972). However, plaintiff does not allege that he has been denied the right to receive mail, he merely claims that its delivery has been delayed. So long as a delay is not unreasonable, it does not reach constitutional dimensions. *Fore v. Godwin,* 407 F. Supp. 1145 (D.C. Va., 1976). Plaintiff's complaint of missing magazines appears from the complaint to be as a result of negligence by guards which does not state a claim of action under § 1983. *Kent v. Prosse,* 265 F. Supp. 673 (D.C. Pa., 1967), affirmed 385 F.2d 406 (3d Cir., 1967). In any event there is no allegation that any of the named defendants were in any way personally involved in delayed mail delivery. Thus, this allegation does not state a claim.

Plaintiff's second allegation deals with physical conditions of the cells, cleaning procedures and maintenance.

In allegation 2(A) he argues that it is cruel and unusual punishment to have to clean the floor while standing on it and to have to carry a change of clothing, towels, toilet articles and a trash bag out of his cell at the same time. The Seventh Circuit has held that to establish a violation of the Eighth Amendment, a prisoner must show either that the actions of the prison intentionally inflicted excessive or grossly severe punishment on him or that conditions were so harsh as to shock the general conscience of

society. *LaBatt v. Twomey,* 513 F.2d 641 (7th Cir., 1975). Plaintiff's allegations in item 1(A), even if true, fail to meet this standard. Trivial or frivilous invasions of personal rights are not cognizable. *Wells v. Ward,* 470 F.2d 1185 (10th Cir. 1972).

Allegation 2(B) alleges that one night plaintiff was denied a change in light bulbs until morning, was unable to get mirrors on hair cut days or matches on demand and was denied a change of linen when holidays fall on Monday. These allegations do not state a claim upon which relief can be granted. He does not allege that he was not allowed to clean his cell or person or that he was denied the material to do it with. His allegation merely is that there were some difficulties involved. Likewise he does not allege that he has been denied haircuts or change of linen, merely that they were sometimes delayed. Trivial or frivilous invasions of personal rights are not cognizable under § 1983. *Wells v. Ward, supra.*

The allegations of unsanitary conditions deal with matters of prison administration, and absent exceptional circumstances, federal courts will not inquire into such matters. *U.S. ex rel. Knight v. Ragen,* 337 F.2d 425, cert. denied, 14 L.Ed.2d 277 (7th Cir., 1964); *Bowman v. Hale,* 302 F. Supp. 1306 (D.C. Ala., 1969). These allegations do not reach constitutional proportions. Similar problems have been held insufficient to suggest deprivation of any right secured by the Constitution or show conditions so foul, inhumane or violative of the basic concepts as to fall within the proscription of the Eighth Amendment. *Adams v. Pate,* 445 F.2d 105 (7th Cir., 1971); *Bussie v. Lankler,* (D.C. N.Y., 1972), 337 F. Supp. 146; *Lovern v. Cox,* (D.C. Va., 1974), 374 Supp. 32. Thus, even if plaintiff's allegations were true, they fail to state a claim of action upon which relief can be granted.

Allegation 2(C) charges that plaintiff has been denied certain food items on three Sundays and has not been able to obtain coffee for evening meals. Prisoners in seclusion are entitled to a diet that provides them appropriate

nutrition but not necessarily entitled to any particular food. *Collins v. Schoonfield,* 344 F. Supp. 257 (D.C. Md., 1972):

> ... As to inmates convicted and serving sentences, the provision or denial of certain foods, provided there is in any event no denial of that quantity and quality of food required for appropriate nutrition, may not be unconstitutional regardless of whether it is advisable .... *Collins v. Schoonfield, supra* at p. 278.

Plaintiff does not allege denial of a nutritional diet merely that some items weren't available at some meals. This is not cruel and unusual punishment.

Item 2(D) alleges that on one occasion in June the heat was left on. This appears to be an isolated instance and there is no allegation that it was intended by officials to punish anyone. Such incidents often occur in institutions of all types especially in seasons when outside temperatures are fluctuating. One such isolated incident is not sufficient to suggest deprivation of any right secured by the Constitution and does not constitute cruel and unusual punishment.

Plaintiff's allegation in item 2(E) is that he suffered from the use of mace on prisoners in adjoining cells. This does not state a claim upon which relief may be granted under 42 U.S.C. § 1983.

> ... when the jail guards used tear gas to quell a disturbance in the exercise area of the jail. The gas penetrated into the appellant's cell and affected his eyes and nasal passages .... But the allegations of the complaint fall short of stating a claim for relief for deprivation of a protected constitutional right. Stripped of all the non-essential verbage, the complaint shows that appellant was caused to come into contact with tear gas used by the jail officers in quelling the disturbance in the prison. Even if this constituted an assault, it was insufficient to sustain an action for relief under the civil rights statute. *Davis v. United States,* 439 F.2d 1118 (8th Cir., 1971) at p. 1119.
>
> As to the tear gas incident, the alleged facts fall far short of demonstrating a violation of a constitutional right. Nowhere is it alleged that the spraying was intentionally or maliciously directed at petitioner, and a single tear gas incident is not likely to amount to the gross negligence that is minimally required to state a good cause of action for inflicting cruel and unusual conditions of confinement. *Fitchette v. Collins,* 402 F. Supp. 147 (D.C. Md., 1975) at p. 157.

As in *Fitchette* and *Davis,* plaintiff does not allege that mace was intentionally or maliciously directed at him, and in such circumstances even if he was affected by the mace, it doesn't amount to cruel and unusual punishment and is not actionable under 42 U.S.C. § 1983. Also there is no allegation of personal involvement of defendants. *Adams v. Pate, supra.*

Allegation 2(F) deals with prisoners plaintiff contends are mentally ill being kept in the same security unit as he is, which he contends endangers him. These allegations do not state a cause of action because he does not claim there has been any actual injury to him, and even if there were an assault by a fellow inmate, it would constitute a tort not cognizable under 42 U.S.C. § 1983. *Kent v. Prosse, supra; Bowman v. Hale, supra; Fitchette v. Collins, supra.* In any event assuming plaintiff's allegations of insanity of other inmates are correct, then defendants are properly discharging their duties to the prison population by keeping these inmates in a security unit rather than in the general population.

Allegation 3 deals with plaintiff's objections to review procedures for prisoners in seclusion. Due process requires periodic review of the situation of persons in segregation. *Kelley v. Brewer,* 525 F.2d 394 (8th Cir., 1975). However, plaintiff does not contend that there was no review, his only objections are that review occurred every thirty days

and was performed by the Conduct Adjustment Board. These objections do not show any denial of equal protection and do not state a claim for which relief can be granted.

Thus, even if plaintiff's allegations were true, they fail to state a violation of constitutional rights cognizable under 42 U.S.C. § 1983.

This Court now DISMISSES this case for failure to comply with Rule 12(b)(6) of the Federal Rules of Civil Procedure and to state a claim upon which relief can be granted.

Enter December 5, 1977.

/s/ Allen Sharp

Judge, United States District Court

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CIVIL ACTION FILE NO. S 77 0035

BILLIE R. ADAMS

vs.

JACK DUCKWORTH, J. F. KOZLOWSKI, P. G. YOUNGBLOOD, BOB GLANEY, R. SHRINER, RODNEY KEITH, RONALD BATCHELOR, BYRON GLICK, G. WILKINS

JUDGMENT

This action came on for (hearing) before the Court, Honorable ALLEN SHARP, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits.

Dated at South Bend, Indiana, this 5th day of December, 1977.

FRANCIS T. GRANDYS
Clerk of Court

/s/ Eugene J. Szynski

Deputy Clerk